

BRB Nos. 90-2181

JOSEPH I. HALL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (88-LHC-2647) of Administrative Law Judge A.A. Simpson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a rust machine operator from 1962 until 1974, where he was exposed to loud industrial noise. Subsequent to working for employer, claimant worked for three other maritime employers; for Todd Shipyards Corporation (Todd Shipyards) for approximately two months in 1974, for Cardinal Construction Company (Cardinal Construction), from 1974 through 1976, and for J.B. Kelly, where he is currently employed, commencing in 1976. An audiogram performed on November 7, 1987, was interpreted by Dr. James Wold as reflecting a 2.1 percent binaural hearing loss. On November 25, 1987, claimant filed a claim under the Act for occupational hearing loss based on the results of this audiogram and provided employer with notice

of his injury that same day. Previously, on May 14, 1987, Assistant District Director¹ Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, controversions and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of a claim by the district director's office. On January 7, 1988, employer filed its notice of controversion. A second audiometric examination performed on October 10, 1989 was interpreted by Dr. J.R. Dickey as indicative of an 8.76 percent binaural hearing loss.

A hearing was held on October 12, 1989, wherein the parties disputed causation, the extent of disability, employer's liability for medical benefits, and the Section 14(e) penalty. Employer additionally attempted to escape liability by arguing that it was not the responsible employer because claimant received subsequent noise exposure while employed in maritime employment prior to the date of injury.

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105 the term "district director" has replaced the term "deputy commissioner" used in the statute.

In his Decision and Order, the administrative law judge, after discussing claimant's testimony regarding his exposure to noise at Todd Shipyards, Cardinal Construction and J. B. Kelly, Inc., determined that employer was liable as the responsible employer because it was the last maritime employer to expose claimant to injurious noise levels. Accordingly, the administrative law judge concluded that employer was liable for claimant's 5.43 percent binaural hearing loss based on the average of the two audiograms of record pursuant to 33 U.S.C. §908(c)(13)(B). The administrative law judge further found that employer was liable for medical benefits in connection with claimant's hearing loss and for payment of a Section 14(e) assessment. On appeal, employer challenges the administrative law judge's finding that it is the responsible employer and in addition contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Claimant responds, urging affirmance of the administrative law judge's award of a Section 14(e) assessment.²

In the instant case, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption. To rebut the presumption, employer must present facts to show that exposure to injurious noise did not cause claimant's hearing loss. Employer also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); see also *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied* 429 U.S. 820 (1976). Herein, employer attempted to avoid liability by establishing that claimant was exposed to injurious noise levels while working at Todd Shipyards, at Cardinal Construction, and at J.B. Kelly, Inc., subsequent to the termination of his employment with employer in 1974.

The rule for determining the responsible employer in an occupational hearing loss case is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last covered employer to expose the claimant to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Id.*, 225 F.2d at 137; *Lins*, 26 BRBS at 62; *Susoeff*, 19 BRBS at 149. Employer asserts that it is not the responsible employer because it is undisputed that claimant's work for Todd Shipyards and Cardinal Construction was maritime employment, and claimant testified that he was exposed to at least some degree of noise while working for these subsequent employers.³

At his deposition, claimant underwent extensive questioning by employer's counsel

²Claimant's motion to strike portions of employer's brief relating to the award of the Section 14(e), 33 U.S.C. §914(e), assessment is denied; the arguments made therein, however, will be considered as his response to employer's appeal.

³On appeal, employer does not challenge the administrative law judge's finding that claimant was not exposed to injurious noise levels while working for J.B. Kelly, Inc.

regarding his exposure to noise while working at Todd Shipyards and Cardinal Construction. Claimant testified that when he was working for Todd Shipyards he was working in the main office picking up trash which was located approximately one-quarter of a mile away from the chippers and other workers in the shipyard. Depo. at 28. He further testified that when he was working for Cardinal Construction, a company which was in the business of building offshore modules for drilling rigs, he was exposed to minimal noise. Depo at 50. Claimant explained that while Cardinal Construction did employ welders and grinders, he was not exposed to noise created by these craftsman because, as a burner, he worked inside a building away from them. Depo. at 35-36. By contrast, claimant testified that while working for employer he was exposed to noise from chipping guns, grinders, scale guns, and rust machine and burr motors from 8 to 12 hours a day, five days or more per week. Depo. at 48-49.

After setting forth claimant's testimony, the administrative law judge concluded that claimant was last exposed to injurious levels of industrial noise while working for employer and that his hearing loss thus arose in the course and scope of that employment. Decision and Order at 2. It is well-established that all adjudicative and fact-finding functions reside in the administrative law judge. *See Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990). Thus, an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). The administrative law judge's finding, based upon claimant's testimony, that claimant was last exposed to high levels of industrial noise while employed by employer is rational and supported by substantial evidence. Employer here did not meet its burden of proving that claimant was exposed to injurious levels of noise in his subsequent maritime employment with Todd Shipyards and Cardinal Construction. *See Avondale Shipyards*, 977 F.2d at 191-192, 26 BRBS at 114-115 (CRT). Accordingly, the administrative law judge's finding that employer is the responsible employer is affirmed.

Turning to employer's appeal of the administrative law judge's determination that it is liable for a Section 14(e) assessment, employer specifically asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Employer further contends that the instant case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *aff'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), because the excuse was granted prior to the date claimant notified employer of his injury rather than retroactively. Additionally, employer contends that even if it had not been excused, the concept of "replacement income" is not applicable in this case, so the Section 14(e) penalty should not apply.

The precise arguments raised by employer regarding the excuse granted by the district director, the inapplicability of *Fairley*, *supra*, and the concept of "replacement income" have been rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934 (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). We therefore reject these specific

allegations of error raised by employer. The administrative law judge's finding that employer is liable for a Section 14(e) penalty is accordingly affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge